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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CONNIE McCAUSLAND,

Plaintiff and Respondent,

v.

SPENCER'S MANUFACTURED  
HOUSING, INC.,

Defendant and Appellant.

B233165

(Los Angeles County  
Super. Ct. No. KC054260)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Robert A. Dukes, Judge. Affirmed.

Cole Pedroza, Curtis A. Cole, Cassidy E. Cole; West & Miyamoto, Ian Corzine for  
Defendant and Appellant.

Connie McCausland, in pro. per., for Plaintiff and Respondent.

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Spencer's Manufactured Housing, Inc. appeals from a judgment entered in favor of respondent Connie McCausland, on her complaint. We affirm.

### Facts

In November 2005, McCausland bought a mobile home from appellant (now known as Community Manufactured Home Sales) which was also responsible for the installation of the home in the mobile home park.

McCausland's evidence was that from the outset the home had a number of problems, which she brought to appellant's attention. Attempts to remedy the problems were unsatisfactory, and on August 24, 2006, by letter, she asked to rescind the contract. The request was unsuccessful, and she filed this lawsuit against appellant and other defendants, seeking rescission and other damages.

McCausland moved to have the court try the equitable issue of rescission (as to appellant only) first, to the court. The court granted the motion.

After that trial, the court granted rescission of the sales contract, finding a "substantial failure of consideration."

McCausland had presented evidence that appellant had not properly graded the lot, resulting in water migrating to the area under the home, raising concerns about erosion, instability, and mold, and voiding the warranty. She also presented evidence that the water under the home had resulted in differential settlement (that is, one part of the home settled more than other parts), causing cracks in the drywall and in the "marriage beam" which tied the two parts of the home together, making windows and doors difficult to open and close, and creating other problems. She presented evidence that this differential settlement would continue in the future.

In finding failure of consideration, the court found that the grading was improper and that water had and continued to migrate under the home. The court did not find "extensive major subsidence at this time . . ." but also found that the crack along the marriage line was substantial and was based on subsidence under the home, and that

appellant's attempts to fix the crack with a cosmetic fix were "of great concern to the court."

McCausland had presented evidence that the sewer line did not have the correct pitch, so that the plumbing backed up. Indeed, McCausland testified that she had to use the plunger in the master bathroom's toilet every day, if not twice a day. In finding failure of consideration the court cited that evidence, too, finding McCausland credible in her testimony and that the defect was a substantial defect.

The court also found that much of the construction was done without permits, and found other problems.

The court found, "The purpose of the contract was, from Ms. McCausland's standpoint, to obtain a manufactured home that was in a safe and sound condition, properly installed, substantially free of defects, and complying with all codes. [¶] She received much less than that. It was not substantially free of defects. It is still not substantially free of defects. It did not comply with all the codes. In fact, it didn't comply with most of the codes at the time of its installation."

The court ordered McCausland to deposit with the clerk all executed documents necessary to transfer title to appellant and to quit the premises. The court also ruled that the consideration failed at the moment McCausland moved into the mobile home, and that she was entitled to be put back in the position she would have been, prior to moving in. Thus, "in order to make McCausland whole and restore McCausland to her former position consistent with equitable considerations," McCausland was awarded her \$206,128 purchase cost, \$37,104 in space rent, \$4,506 she had paid in insurance, and \$5,442 she had paid in property taxes. She was also awarded prejudgment interest from the time of her demand for rescission.

McCausland's post-trial request for a jury trial on additional damages was denied.<sup>1</sup> The court found that, having elected to proceed on rescission, and having been successful in that claim, McCausland no longer had the right to seek damages.<sup>2</sup>

## Discussion

### 1. Right to a jury trial

Appellant first contends that it was entitled to a jury trial on rescission. Our review of the court's decision to try rescission to the court is *de novo*. (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 23.)

Legally, appellant relies on the rule that determining whether an action for rescission is legal or equitable "depends in large measure upon the mode of relief to be afforded," as "ascertained from the gist of the action as framed by the pleadings and the facts in the case" (*Paularena v. Superior Court* (1965) 231 Cal.App.2d 906, 911) and that where the equitable relief sought is "merely incidental to the recovery of a money judgment," the action is one at law. (*Id.* at p. 914.)

None of that authority establishes that appellant was entitled to a jury trial here. First, appellant did not really ask for a jury trial. During oral argument on McCausland's motion to try rescission to the court, the court informed counsel that it was inclined to grant the motion. Appellant's counsel said, "I like your suggestion," but asked for additional time to research the issue and to talk to his client to see whether the client would stipulate to the court trial. The court did not grant the request for more time, noting that a stipulation was not necessary, but we cannot see that appellant truly opposed the motion.

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<sup>1</sup> In making the request, McCausland cited appellant's insurance, saying that "[s]ubsequent to the equitable trial, . . . the benefits of that have evaporated due to exclusion contract terms that exclude the coverage." The court found that appellant's insurance was not relevant.

<sup>2</sup> Relying on discovery responses, the court also found that McCausland could not prove damages against the remaining defendants.

Further, we do not see that the court's ruling was in error. It is true that, as appellant argues, after the court granted rescission, McCausland sought damages to repair the mobile home, but the court found that McCausland had elected to proceed in equity and could not additionally seek compensatory damages and denied the request. The court's initial decision to hold a court trial on rescission cannot have been rendered erroneous by McCausland's later, unsuccessful attempt to obtain additional damages.

It is also true that the complaint sought a variety of damages, but again, we do not see that that fact means that the action was other than equitable. In determining whether an action is essentially one in equity, the prayer for relief is not conclusive and the fact that damages is one of many possible remedies does not guarantee the right to a jury. (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 9.)

Nor do we see that the equitable damages were "merely incidental" to a money judgment. Instead, McCausland sought rescission, and only later attempted to supplement the rescission with a money judgment.

Appellant also cites the rule that "a rescinding plaintiff who does seek to recover money paid as consideration for a contract may not deprive the defendant of a jury trial merely by framing the complaint as an action in equity asking for judicial rescission." (*NMSBPCSLDHB v. County of Fresno* (2007) 152 Cal.App.4th 954, 963.) That is not what happened here.

The issue at the trial was purely equitable, and appellant was not entitled to a jury trial.

## 2. Sufficiency of the evidence

Appellant next contends that the evidence did not support the judgment, because there was no evidence of differential settlement.

McCausland's expert, Christopher Krall, testified that through testing and observation, he concluded that grading problems meant that water collected underneath the house, that that condition caused differential settlement, and that differential settlement caused cracks in walls and ceilings, and that he observed such cracks in

McCausland's home. Other witnesses confirmed the existence of grading problems, and the existence of cracks in the home. This is sufficient to support the judgment.

Appellant's reliance on a statement made by Krall on cross-examination is misplaced. In the cited portion of his testimony, he said that "my conclusion is that those increased moisture conditions underneath the home are impacting the support of the home at least in part and creating the potential for this differential settlement. And that's evidenced by the cracking in the home. [¶] So it appears that a portion of this home, most likely the northeast corner . . . is impacted by settlement, and that's causing the distress that we see in the structure of the home." This, along with the rest of his testimony, is not a mere statement that differential settlement might occur at some point in the future, but is evidence that the mobile home was affected by differential settlement.

Appellant also cites its own expert's testimony that there was no differential settlement, and the evidence that McCausland's mobile home and its installation passed inspection. However, on a substantial evidence review, our power as an appellate court "*begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination" of the trier of fact. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874.) The fact that the appellant's expert disagreed is of no moment. We say the same about the evidence that the home passed inspection, particularly because the inspector was a defense witness at trial, and the court found that although the inspector was credible, his inspection was by sight, not by measurement.

Appellant also cites *Murphy v. Sheftel* (1932) 121 Cal.App. 533, for the proposition that "where the defect is not such a failure to perform as renders the performance of the rest of the contract a thing different in substance from what was contracted for, and the loss occasioned is capable of compensation in damages, there is a substantial performance [citations]." (*Id.* at p. 540.) Appellant cites the testimony of its own expert that the defects proven at the trial court could have been addressed with an award of the cost of repair, and contends that rescission was not appropriate. *Murphy* also held that "The defects must not be so essential as to substantially defeat the object

which the parties intended to accomplish; and whether defects or omissions are substantial is generally a question of fact." (*Ibid.*) The trial court was the finder of fact here, and on the evidence presented by McCausland, found that the defects did render the sales contract "a thing different in substance from what was contracted for."

### 3. Damages

Appellant argues that the damages were excessive in three ways, contending that the court failed to award it a set off for the five years in which McCausland lived in the home, that the award of damages for rent, insurance, and property taxes was improper because it did not cause those damages, and that prejudgment interest should not have been awarded on the damages for rent, insurance, or property taxes.

#### *Set off*

Appellant called an appraiser, Victoria Bryant, who testified that the reasonable market rent for similar substitute housing was \$2,100 a month. She did not base her calculation on data concerning mobile homes, testifying that there was no such data, but instead compared McCausland's mobile home to a single-family home. Based on this evidence, appellant asked the court to offset the damages by \$2,100 a month for the five years in which McCausland lived in the mobile home.

The court denied the request for two reasons, first finding that "there's a failure of proof as to the value of the rent," noting that Bryant had compared the mobile home to a single-family home on a large lot, and finding that the comparison was not valid, and also noting the absence of testimony concerning reasonable rentals of condominiums, which might be more relevant, or other mobile homes.

The court also found that "I don't feel any setoff in this instance is appropriate because the unit was not appropriately habitable from the date Ms. McCausland took possession of the unit and would not have been appropriately inhabitable by another person. And to make her reimburse for a reasonable rental value under equity . . . is not a proper measure of damages in this case. So the court declines to offset the damages as indicated by any fair rental value."

Appellant cites authority for the proposition that when rescission is ordered, a seller is entitled to a credit for the reasonable rental value of the property during the rescinding buyer's occupancy (Miller & Starr, Cal. Real Estate (2011) § 34.9) and argues that because its evidence on fair market value was the only evidence on the subject, the trial court was bound to accept it. We have no quarrel with the legal principle, in general, but it does not establish trial court error here.

The court was not bound to credit Bryant's testimony. Given Bryant's own testimony about the basis for her valuation, there was substantial evidence for the court's finding that appellant had not established fair rental value.

Nor do we agree with appellant that the court's ruling resulted in an unjust enrichment to McCausland. In its alternate ground for denying the set off, the court found that the mobile home was so deficient that a set off would be inequitable. Again, there was substantial evidence for the ruling.

*Rent, Insurance, and Taxes; Prejudgment Interest*

Here, appellant argues that it did not cause those damages, in that McCausland would have made payments for those items even if she had lived somewhere else. That is not necessarily so. She could, perhaps, have lived in a rented home, and not paid property taxes, or with a family member, and not paid rent. More to the point, in equitable actions such as rescission, "'the court should do complete equity between the parties' and to that end 'may grant any monetary relief necessary' to do so. [Citation.] It is the purpose of rescission 'to restore both parties to their former position as far as possible' [citation]." (*Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304, 316, Civ. Code, § 1692.)

The damages of which appellant complains put McCausland into a status quo ante position, and were proper rescission damages.

Appellant also contends that some of the sums for rent, insurance, and taxes did not exist as of the "time of rescission," by which appellant means, by the time of McCausland's request for rescission, and thus were not "certain or capable of being made



certain," so that prejudgment interest was not awardable. (Civ. Code, § 3287, *Stein v. Southern Cal. Edison Co.* (1992) 7 Cal.App.4th 565, 573.)

This contract was not rescinded until the trial court made its order. Moreover, in this equitable action, prejudgment interest was a proper measure of damages.

At oral argument, McCausland informed us that the contract has not yet been rescinded or the damages paid. We are confident that on remittitur to the trial court, both parties will take the necessary steps to satisfy the judgment in this case.

#### Disposition

The judgment is affirmed. The matter is remanded to the trial court for all further proceedings necessary for execution of that court's orders.

Respondent to recover costs on appeal.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.